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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CASE NO. 80-6785

JOSEPH ROBERT SPAZIANO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on January 8, 1981.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 50,250, is reported at 393 So.2d 1119 (Fla. 1981) and is set out in pages 1-5 of the Appendix.*

JURISDICTION

The judgment of the Supreme Court of Florida was filed on January 8, 1981, and rehearing was denied on March 6, 1981 (A 28). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. On April 23, 1981, Mr. Justice Powell granted an extension of time in which to file a petition for writ of certiorari in the above-entitled cause "to and including June 4, 1981."

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*The symbol "A" followed by the appropriate page number will designate the Appendix filed separately herewith.

QUESTION PRESENTED FOR REVIEW

WHETHER THE STATE OF FLORIDA HAS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY ARBITRARILY DENYING TO PERSONS CHARGED WITH FIRST DEGREE MURDER WHO WERE PROSECUTED AFTER THE STATUTE OF LIMITATIONS HAD RUN ON ALL LESSER DEGREES OF MURDER AND MANSLAUGHTER THE RIGHT THAT IS CONFERRED ON ALL PERSONS CHARGED WITH DEGREE CRIMES IN FLORIDA: TO HAVE THE JURY CHARGED ON ALL LESSER DEGREES OF MURDER AND MANSLAUGHTER.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

. . . nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 932.465, FLORIDA STATUTES (1973)

Limitation of prosecutions.
(1) A prosecution for an offense punishable by death may be commenced at any time.
(2) Prosecution for offenses not punishable by death must be commenced within two years after commission, but if an indictment, information, or affidavit has been filed within two years after commission of the offense and the indictment, information, or affidavit is dismissed or set aside because of a defect in its content or form after the two year period has elapsed, the period for commencing prosecution shall be extended three months from the time the indictment, information, or affidavit is dismissed or set aside.

RULE 3.490, FLORIDA RULES OF CRIMINAL PROCEDURE

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

STATEMENT OF THE CASE

On September 12, 1975, the prosecution against Joseph Robert Spaziano was commenced by the filing of an indictment for the capital felony of first degree murder for the killing of Laura Harberts alleged to have occurred on or about August 6, 1973 (Trial Record at 1-2).

Petitioner was tried by jury for the offense of first degree murder. After the submission of evidence, outside the presence of the jury, the trial judge presented Petitioner with the choice of waiving the statute of limitations which had run as to all lesser included non-capital offenses and having the jury instructed only as to first-degree murder. Petitioner chose the latter with the result that the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses (Trial Transcript at 751-755). The jury, after deliberating more than five hours and after being given the standard jury deadlocked charge, returned a verdict of guilty of first-degree murder. The same jury recommended that Petitioner be sentenced to life imprisonment but that advisory verdict was overridden by the trial judge who sentenced Petitioner to death on July 16, 1976.

After submission of briefs and oral argument but prior to the decision, Petitioner twice filed Motions for Leave to File Supplemental Brief in order to fully raise the issue presented herein on direct appeal in the Supreme Court of Florida (A 6-7, 10-14). Both motions were denied without prejudice to the filing of a Notice of Supplemental Authority (A 8, 15). Pursuant to the Court's Order, Petitioner filed a Notice of Supplemental Authority (A 9). The Supreme Court of Florida affirmed Petitioner's conviction concluding that:

> By Notice of Supplemental Authority, Spaziano raises the argument that the state may not under Beck v. Alabama, 447 U.S. ___, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), force him to choose between waiving the statute of limitations which

> had run as to all lesser included noncapital offenses and having the jury instructed only as to first-degree murder. The Beck v. Alabama decision did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense. Whatever the implications of Beck v. Alabama may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.

(A 4). Petitioner's timely Motion for Rehearing (A16-27) was denied with Chief Justice Sundberg and Justice England voting to grant the motion "for purposes of receiving briefs and argument on the Beck issue" (A 28).

REASONS FOR GRANTING THE WRIT

The decision below presents an important issue of constitutional law which has not been, but should be, settled by this Court; namely, the right of citizens, charged with crimes, to receive the equal benefit of mandatory procedural rules deemed by Florida to be essential to a fair trial.

The crime of first degree murder has been defined by the Florida Legislature as a degree crime. Section 782.04, Florida Statutes (1973). It is abundantly clear under Florida law that an individual charged with a degree crime is entitled as a matter of right to have the jury instructed as to all degrees of the offense. Brown v. State, 206 So.2d 377, 381 (Fla. 1968). Indeed Rule 3.490, Florida Rules of Criminal Procedure mandates instruction on all degrees.

Petitioner was charged with and tried for the crime of first degree murder. Were it not for the running of the statute of limitations, under Florida law Petitioner would have been given lesser degree instructions.[1]

---

[1]The fact that Petitioner was forced to choose between waiving the statute of limitations or having the jury instructed only as to first degree murder is irrelevant for it is clear that but for the running of the statute of limitations instructions on the lesser degree offenses would have been given and the question of waiver would never have been raised. (Trial Transcript at 751-755). Additionally, under Florida law, the statute

The importance of the right of an accused in Florida to have the jury instructed on lesser degrees was noted by Justice Boyd, dissenting from the discharge of jurisdiction in Holloway v. State, 379 So.2d 953, 954 (Fla. 1980):

> The accused has a right to have the jury instructed on all less serious included offenses regardless of the expiration of the limitations period on the lesser offenses. The purpose of these instructions is to guide the jury in reaching the proper verdict and the running of the statute of limitations should have no effect.
>
> The function of the jury, in reaching the proper verdict, is to make factual and not legal determinations. If the jury finds that the conduct of the accused fits under a certain category of crime, it so informs the court in its verdict. The judge then decides the legal question of whether upon the verdict rendered an adjudication of guilt is proper. If the verdict finds the accused guilty of an offense barred by the statute of limitations, the court should acquit the defendant.

Additionally, Florida law clearly recognizes the right to a jury pardon and extends that right to all those accused of degree crimes. Brown v. State, supra; Bailey v. State, 224 So.2d 296 (Fla. 1969).

The decision to instruct a trial jury on lesser degree crimes must not be an arbitrary one. While a state is free to limit the application of procedural and substantive rights, it cannot do so in an arbitrary and capricious fashion. The rights involved here are both substantive [Section 932.465, Florida Statutes (1973)] and procedural (Fla.R.Crim.Pro.3.490).

This Court has recognized the critical importance in the jury trial process of lesser offense instructions. In Keeble v. United States, 412 U.S. 205 (1973), the absolute deprivation of lesser offense instructions created precisely the risk of fact-finding errors which was emphasized in this Court's opinion in In Re Winship, 397 U.S. 358 (1970). In

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Footnote 1 continued:
of limitations is a bar to jurisdiction and not an affirmative defense susceptible to waiver. See, e.g., Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); State v. King, 282 So.2d 162 (Fla. 1973); Akers v. State, 370 So.2d 81 (Fla. 1st DCA 1979).

Keeble, supra, this Court addressed the question of whether the Major Crimes Act of 1885 should be construed to prohibit a jury instruction on a lesser included offense where the lesser included offense was not one of the crimes enumerated in the act. This Court reversed the defendant's conviction for the greater offense, holding that the defendant was entitled to an instruction on a lesser offense even though there was no jurisdiction to try him on the lesser offense.[2] The value of such a safeguard was explained:

> . . . if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction --in this context or any other--precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. (Emphasis in original). 412 U.S. at 212-213.

Applying the above principles announced in Keeble in a capital case, this Court in Beck v. Alabama, 447 U.S. ___, 100 S.Ct. 2382 (1980) held that a sentence of death may not constitutionally be imposed after a jury verdict of guilt of a capital offense if the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses. In arriving at the decision it was stated:

> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (Footnote omitted). 100 S.Ct. at 2389-2390.

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[2]Although the Eighth Circuit, in Felicia v. United States, 495 F.2d 353 (8th Cir. 1974) held that the District Court would have jurisdiction over the lesser offense, this Court found it unnecessary to address this issue in reaching its conclusion. Keeble v. United States, 412 U.S. 205, 214 n. 14. The lack of jurisdiction

This Court's committment to the lesser offense doctrine was reaffirmed in observing that "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 100 S.Ct. at 2389.

Most recently, in Holloway v. Florida, ___U.S.___, 101 S.Ct. 281 (1980), Mr. Justice Blackmun with whom Mr. Justice Brennan and Mr. Justice Marshall joined, dissented from the denial of certiorari in a case raising the identical legal issue presented herein. Mr. Justice Blackmun, after reviewing the Court's previous decisions, observed that "the Court more than once has expressed the understanding that a lesser included offense option minimizes the risk of undermining the reasonable doubt standard." 101 S.Ct. at 282. He concluded that:

> The Court's decisions in both Keeble and Beck imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential fact-finding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, legal matter with which the factfinder need have no concern. 101 S.Ct. at 283.

Mr. Justice Blackmun recognized that this Court has never explicitly held that a defendant is entitled to a lesser included offense instruction as a matter of due process. 101 S.Ct. at 283, n. 4. However, where a crime by definition includes lesser degrees and instructions on those lesser degrees are mandatory, due process requires instructions on those lesser degrees to reduce the substantial risk that foreclosure of a lesser-degree instruction may induce fact-finding error.

Footnote 2 continued:

was precisely the reason why Mr. Justice Stewart, Mr. Justice Powell and Mr. Justice Rehnquist dissented: "I think this holding would be correct only if the lesser included offense were one over which the federal court had jurisdiction." Keeble v. United States, 412 U.S. at 215 (dissent).

Florida's actions further are violative of equal protection. By depriving a segment of those accused of degree crimes the right to lesser degree instructions, Florida emasculates those fundamental rights of its accused citizens. Because of this discrimination, Florida's decision to single out those of its citizens accused of degree crimes after the statute of limitations has run on lesser degrees for different substantive and procedural treatment must be strictly scrutinized in order that the constitutionality of this status classification" . . . be judged by the stricter standard of whether it promotes a compelling state interest." Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

Similar classifications have been condemned by this court as violative of equal protection where the classification restricted a fundamental right and promoted no compelling state interest. In Dowd v. United States, 340 U.S. 206 (1951) the Court held that state officials who prevented a prisoner from filing an appeal while the same right was granted to those persons not in prison was a denial of equal protection. Likewise, in Griffin v. Illinois, 351 U. S. 12 (1956) this Court held that an indigent was entitled to a trial transcript while seeking the appellate review which was integral to a state trial system for finally adjudicating innocence or guilt. In Gerstein v. Pugh, 420 U.S. 103 (1975) the failure to provide a procedure for an independent determination of probable cause in order to detain a citizen after a warrantless arrest was deemed violative of equal protection where persons arrested with a warrant had a right to a probable cause determination.

Florida has imposed its mandatory rule of instructions on lesser degree crimes because it deems such instructions integral to a full and fair determination of the innocence or guilt of one charged with a degree crime. Florida, throughout the litigation below, has never advanced any rationale for its

decision to deny the petitioner lesser degree jury instructions save its claim of statute of limitations. Indeed, we submit no rationale exists. The effect of the classification in the instant case has been that Petitioner has been sentenced to die as the trial judge overruled the only safeguard left to Petitioner's jury - the advisory sentence of life imprisonment. Such an invidious result cannot be squared with constitutional guarantees.

CONCLUSION

The right of instructions on lesser degree crimes is fundamental to Florida's scheme of fairness and goes to the integrity of the fact-finding process. The due process, equal protection and cruel and unusual punishment questions posed here are substantial and are of great importance. The ruling below collides with these constitutional guarantees and review by this court is necessary to resolve this disharmony. For these reasons the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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BY _____
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Assistant Public Defender

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CASE NO. 80-6785

JOSEPH ROBERT SPAZIANO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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1. Based on ___ Petition ___ Information ___ Indictment filed _____, 19___, _____ on _____, 19___, was adjudicated to have committed a delinquent act for violation of Florida Statute(s) _____ which constitute(s) the offense(s) of _____

_____

and for which the maximum sentence allowable by law is _____

_____

2. All persons entitled to notice of this hearing were duly and properly notified and the following were present: _____

_____

_____

_____

with _____, attorney(s) and _____ representing the Department of Health and Rehabilitative Services;

The predisposition study prepared by the Department of Health and Rehabilitative Services was received and considered, as was all other relevant and material evidence offered; and compliance with the dispositional considerations, determinations and discussions required by law having been established.

It is ORDERED that this child be, and _____ is hereby committed to the custody of the Department of Health and Rehabilitative Services for an indeterminate period, but not longer than: (a) the nineteenth birthday; (b) the maximum sentence allowable by law, allowing _____ days credit for time spent in detention or other incarceration prior to this commitment; or (c) until otherwise legally released and discharged therefrom, whichever first occurs.

The parties are advised that an appeal is authorized by law, but it must be commenced within thirty days from the date of this order.

ORDERED at _____, Florida, this _____ day of _____, 19___

_____

CIRCUIT JUDGE

Joseph Robert SPAZIANO, a/k/a Crazy Joe, Appellant,

v.

STATE of Florida, Appellee.

No. 56250.

Supreme Court of Florida.

Jan. 8, 1981.

Rehearing Denied March 6, 1981.

Defendant appealed from imposition of death sentence after his conviction in the Circuit Court, Seminole County, Robert B. McGregor, J., for first-degree murder. The Supreme Court held that: (1) evidence was sufficient to sustain jury verdict of guilty; (2) colloquy between jury foreman and trial judge concerning status of jury deliberations was proper; (3) standard jury instruction for deadlocked jury is not improper; (4) jury is not required to determine guilt or innocence of lesser included offenses for which defendant could not be convicted and adjudicated guilty; (5) trial judge's consideration of confidential information in presentence investigation report without first disclosing information to defendant and providing defendant with opportunity to present evidence in response denied defendant due process of law; and (6) trial judge's consideration of prior convictions for nonviolent offenses and misdemeanors and charges for which there were not convictions was improper.

Conviction affirmed, remanded for resentencing.

1. Homicide ⇐250

Evidence in prosecution for murder, which included testimony of witness who had led authorities to dump where bodies were found two years after witness had observed them with defendant, was sufficient to sustain jury's verdict of guilty.

2. Criminal Law ⇐864

Colloquy between trial judge and jury foreman in murder prosecution, in which judge asked jury foreman whether there was reasonable probability, that jury could agree upon verdict, and foreman replied he did not know but believed jury would like more time to deliberate, was proper.

3. Criminal Law ⇐863(2)

Standard jury instruction that it is duty of jury to agree upon verdict if they can do so without violating conscientiously held convictions of individual jurors is fair, unbiased, and not improper. SJI No. 2.19, 31 West's F.S.A. (Repealed).

4. Criminal Law ⇐881(4)

Jury is not required to determine guilt or innocence of lesser included offenses for which defendant could not be convicted and adjudicated guilty because statute of limitations on lesser included offenses had run.

5. Constitutional Law ⇐270(2)

Where judge used confidential information in presentence investigation report without first disclosing information to defendant and providing defendant an opportunity to present evidence in response, imposition of death sentence denied defendant due process of law. U.S.C.A.Const. Amend. 14.

6. Criminal Law ⇐986.2(4)

In considering defendant's prior criminal record, trial judge is limited to only those offenses for which defendant was previously convicted. West's F.S.A. § 921.141(5), (5)(b).

7. Homicide ⇐354

Consideration of convictions for nonviolent offenses and misdemeanors and charges for which there were no convictions by judge in imposing death sentence upon defendant convicted of murder was improper. West's F.S.A. § 921.141(5), (5)(b).

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender and Jerry L. Schwarz, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Wallace E. Allbritton and David P. Gauldin, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

This is a direct appeal from the imposition of a death sentence after the appellant had been convicted of first-degree murder. After receiving a jury recommendation of a life sentence for the murder conviction, the trial judge imposed the sentence of death. For the reasons expressed, we affirm the conviction but find we must remand for resentencing because the trial judge relied in part on information not available to the jury or the defendant in imposing the death sentence, contrary to *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and also relied upon nonstatutory aggravating factors, in violation of section 921.141, Florida Statutes.

The material facts reflect that the skeletal remains of two bodies were discovered at the Altamonte city dump. One body was positively identified through the use of dental records as that of Laura Harberts. The appellant, Robert Spaziano, was charged with the murder of Harberts, and the principal witness for the state was Ralph Dilisio, a sixteen-year-old acquaintance of the appellant. Dilisio testified that Spaziano often bragged about the girls he had mutilated and killed, and on the occasion Dilisio and another individual accompanied the appellant to the Altamonte dump site where Dilisio saw two corpses, both covered with blood. Dilisio stated that Spaziano claimed responsibility for these killings; one of the corpses was determined at trial to have been Laura Harberts.

The appellant attacked Dilisio's testimony as being unreliable because at the time he viewed the corpses, Dilisio had been taking numerous types of drugs on a regular basis for at least a year. Defense counsel challenged the sufficiency of Dilisio's recall and perception abilities because of the drug habit, although Dilisio testified that on the particular day of the sighting he had not taken any drugs. Dilisio was able to successfully direct the police to the site where the corpse of Laura Harberts was found.

After receiving its instructions, the jury began its deliberations at 4:39 p. m. and at approximately 8:30 p. m. the court sent the jury to dinner. Upon its return, the following colloquy took place between the trial judge and the jury foreman:

> THE COURT: Mr. Pascual, as foreman, the Court would inquire of you if you think that if given more time, there is a reasonable probability that the jury could agree upon a verdict, it being the jury's function to do so?
>
> MR. PASCUAL: Your Honor, I don't know if I can say that there will be reasonable probability, but I think I can speak for the entire jury that I believe we would like to spend some more time. We don't feel, I don't believe, that we're at the point where we are at an impasse that cannot be overcome.

The jury then continued to deliberate until 10:26 p. m., at which time the jury was brought back, and, in response to an inquiry from the judge as to whether or not they would be able to reach a verdict, the foreman replied: "At this point, Your Honor, I don't believe so." The trial court then proceeded to instruct the jury by using standard jury instruction 2.19 in effect at the time of the trial, which read as follows:

> Ladies and gentlemen, it is your duty to agree upon a verdict if you can do so without violating conscientiously held convictions that are based on the evidence or lack of evidence. No juror, from mere pride or opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating a case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and that this case may be disposed of. [Now renumbered as 2.21.]

The jury resumed their deliberations and approximately thirty minutes later, shortly after 11:00 p. m., they returned a verdict of guilty.

At the conclusion of the sentencing phase of the trial, the jury recommended that the defendant receive a sentence of life imprisonment. The trial court ordered a presentence investigation. In his sentencing order, the judge stated that he considered the presentence investigation report as well as the facts heard during the trial, and found that sufficient aggravating circumstances existed to justify the death sentence. The trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and, secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person. The trial judge based the second finding upon convictions listed in the presentence investigation report, including two convictions discussed in a confidential section of the report. Finally, the trial court found that the other statutory categories of aggravating circumstances were inapplicable, and that there were no mitigating circumstances.

Pursuant to *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), after notice of appeal was filed we directed the trial judge to disclose any information he may have used in sentencing that was not disclosed to the defendant. In his response, the trial judge advised this Court that neither party received copies of the confidential portion of the presentence investigation report, nor did they receive the personality inventory report that was attached to it. The trial judge did, in fact, use this information in imposing this death sentence.

Trial Phase

The appellant asserts as grounds for error in the trial phase that: (a) the evidence was insufficient to support the jury's verdict, (b) the trial court erred in its instructions to the jury concerning their responsibilities, and in giving the approved standard jury instruction after an apparent deadlock; (c) the prosecutor's summation was inflammatory and prejudicial; (d) the trial court improperly limited cross-examination of a

prosecution witness; and (e) the trial court improperly denied appellant's request for a jury view of the scene.

[1] With reference to the contention that the evidence is insufficient, the appellant asks us to reject in totality the testimony of Dilisio. Dilisio led the authorities to the dump where the bodies were found two years after he observed them with the appellant. Both the jury and the trial judge had a superior vantage point to weigh the credibility of Dilisio's testimony. We find the evidence in this record was sufficient to sustain this jury's verdict.

[2, 3] The contention that the trial judge made improper comments during a colloquy with the jury foreman concerning the status of jury deliberations, and the assertion by the appellant that our standard jury instruction for a deadlocked jury is improper, are both without merit. The colloquy was clearly reasonable and proper, and we find that our standard jury instruction, presently standard 2.21, is fair, unbiased and has been specifically approved by this Court in *State v. Bryan*, 290 So.2d 482 (Fla.1974). In addition, such a charge has also been approved by the Fifth Circuit Court of Appeals. *United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978); *United States v. Solomon*, 565 F.2d 364 (5th Cir. 1978); *United States v. Bailey*, 480 F.2d 518 (5th Cir. 1973).

The contention that the prosecutor's comments were inflammatory and prejudicial, that the trial court improperly limited cross-examination and that the trial court improperly denied a jury view, are clearly without merit and do not warrant discussion.

[4] By Notice of Supplemental Authority, Spaziano raises the argument that the state may not under *Beck v. Alabama*, 447 U.S. ——, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), force him to choose between waiving the statute of limitations which had run as to all lesser included noncapital offenses and having the jury instructed only as to first-degree murder. The *Beck v. Alabama* decision did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense. Whatever the implications of *Beck v. Alabama* may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.

Sentencing Phase

The trial judge considered a confidential portion of the presentence investigation report which contained information that the appellant had been a suspect in four homicides and three bombings, was a member of the "Outlaws" gang, had been convicted of rape and sentenced to the state prison, had been charged with forcible carnal knowledge, rape, and false imprisonment for another incident, but allegedly escaped prosecution because of harassment and threats towards the victim by gang members, and had been convicted of other nonviolent felony and misdemeanor offenses.

[5] In *Gardner v. Florida*, decided after the trial and sentence in this cause, the United States Supreme Court held that a defendant in a death case is denied due process of law when the death sentence is imposed, even in part, on the basis of information that he had no opportunity to deny or explain. The *Gardner* decision prohibits the judge's use of this confidential information in the presentence investigation report without first disclosing that information to Spaziano and providing an opportunity to present evidence in response. Under the standards set down in *Gardner*, we must find clear error in the use of the confidential portion of the presentence investigative report.

[6, 7] Section 921.141(5), Florida Statutes, limits the factors in aggravation which may be considered by the trial judge in imposing the death sentence. In considering a defendant's prior criminal record, the trial judge is limited to only those offenses for which "the defendant was previ-

ously convicted." *Provence v. State*, 337 So.2d 783 (Fla.1976). Further, these underlying convictions are also limited to "another capital felony or . . . felony involving the use or threat of violence to the person." § 921.141(5)(b), Fla.Stat. The prior felony offenses involving violence for which the appellant in this case was convicted are proper factors to be considered in aggravation. However, the convictions for nonviolent offenses and misdemeanors and charges for which there was no conviction must be excluded as aggravating factors.

In conclusion, we find the *Gardner* violation and the statutory limiting factors in aggravation require this cause to be remanded to the trial judge for resentencing.

We affirm the conviction and remand for resentencing by the trial judge in accordance with the views expressed in this opinion.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO, Appellant	)	
vs.	)	CASE NO. 50,250
STATE OF FLORIDA, Appellee.	)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Appellant, JOSEPH ROBERT SPAZIANO, hereby moves this Honorable Court for an Order allowing Appellant to file a supplemental brief in the instant case, and as grounds therefor, states:

1. Appellant was sentenced to death on July 16, 1976.

2. The initial brief of Appellant was filed in September, 1978.

3. Oral argument was heard in the present case on October 3, 1979.

4. Since that time the United States Supreme Court has decided the case of Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382 (June 20, 1980) which held that a sentence of death may not be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses. In arriving at its decision, the Court stated:

> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (Footnote omitted). 100 S.Ct. at 2389-2390.

In the present case Appellant was given a choice of waiving the statute of limitations which had run as to all lesser included non-capital offenses or of having the jury instructed only as to first degree murder. Appellant chose the latter

with the result that the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses (T 751-755). Thus a serious constitutional issue is presented for this Court's determination. The issue involves questions of reliability, as well as due process and equal protection of the laws. Beck v. Alabama, supra; United States v. Jackson, 390 U.S. 570(1968). This Court has not previously addressed this issue, although certiorari was denied after hearing argument in Holloway v. State, 379 So2d 953(Fla.1980) because of a lack of decisional conflict.

5. Briefing of this issue is essential to afford Appellant, an indigent defendant who has been sentenced to death, full and fair appellate review. Additionally, briefing of this issue will aid this Court in fulfilling its duty to independently review the entire record to determine whether the interests of justice require a new trial. Fla.App.R. 9.16 (b); Fla.R.App.P. 9.140(f).

WHEREFORE, Appellant respectfully requests this Court to enter an Order allowing twenty(20) days in which to file a Supplemental Brief limited to the foregoing issue consisting of no more than ten (10) pages in length.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida
(305) 837-2150

Best Copy Available

BY _____
JERRY L. SCHWARZ
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable Wallace E. Allbritton, Atttorney General's Office, The Capitol, Tallahassee, Florida, this 14 day of September, 1980.

_____
Of Counsel.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 25, 1980

JOSEPH ROBERT SPAZIANO

Appellant,

vs. CASE NUMBER 50,250

STATE OF FLORIDA

Appellee.

* * * * * * * * * * * * * * * * * *

Upon consideration of the Appellant's motion for leave to file supplemental brief, the motion is denied without prejudice, to the filing of a Notice of Supplemental Authority, pursuant to Rule 9.210(g).

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM
C: Jerry L. Schwarz, Esquire
Wallace E. Allbritton, Esquire

IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 50,250

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, JOSEPH ROBERT SPAZIANO, by and through undersigned counsel, pursuant to this Court's Order dated September 25, 1980, hereby gives notice to all parties, and this Honorable Court, of intent to rely on the following authority in the case at bar:

> Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382(1980) which held that a sentence of death may not be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses:
>
> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination."(Footnote omitted). (Emphasis Supplied). 100 S.Ct. at 2389-2390.

Regarding the impropriety of forcing Appellant to choose between waiving the statute of limitations which had run as to all lesser included non-capital offenses and having the jury instructed only as to first degree murder.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of FLorida
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(305) 837-2150

BY _____
JERRY L. SCHWARZ
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 50,250

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Appellant, JOSEPH ROBERT SPAZIANO, by and through his undersigned counsel, hereby moves this Honorable Court for an Order allowing Appellant to file a supplemental brief of no more than ten(10) pages in length in the above-styled cause, and as grounds therefor, states:

1. Appellant was sentenced to death on July 16, 1976.

2. The initial brief of Appellant was filed in September, 1978.

3. Oral argument was heard in the present case on October 3, 1979.

4. On September 11, 1980, undersigned counsel filed a Motion for Leave to File Supplemental Brief based on the intervening decision of the Supreme Court of the United States in Beck v. Alabama, 447 U.S. ___, 100 S.Ct. 2382(June 20, 1980), a copy of which motion is attached hereto and by reference made a part hereof. By Order dated September 25, 1980 this Court denied Appellant's motion "without prejudice, to the filing of a Notice of Supplemental Authority, pursuant to Rule 9.210(g)." On October 13, 1980 undersigned counsel filed a Notice of Supplemental Authority pursuant to the above described Order.

5. Since that time on October 14, 1980, the Supreme Court of the United States denied certiorari in Holloway v. Florida,

___U.S.___, 49 U.S.L.W. 3268(1980). However Justice Blackmun, with whom Justice Brennan and Justice Marshall joined, dissented from the denial of certiorari because they believed the case presented "an important due process question requiring interpretation of our decisions in Keeble v. United States, 412 U.S. 205(1973), and Beck v. Alabama, 447 U.S.___(1980)." Id. Justice Blackmun after reviewing those decisions concluded that:

> The Court's decisions in both Keeble and Beck imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential fact-finding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, legal matter with which the factfinder need have no concern. 49 U.S.L.W. at 3268-3269.

These same concerns were expressed by Justice Boyd in his dissenting opinion from this Court's decision, after hearing argument, to deny certiorari because of a lack of jurisdiction. Holloway v. State, 379 So.2d 953(Fla. 1980). Of course Holloway was not a capital case and the concerns expresssed by Justice Blackmun and Justice Boyd are further heightened in the instant case because the death penalty is involved. See Beck v. Alabama, supra, 447 U.S. at ___, 100 S.Ct. at 2389-2390. Thus, the issue has never been decided on its merits by this Court.

6. The instant motion is filed in the utmost good faith and with due deference to this Court, solely for the purpose of preserving Appellant's rights to full and fair appellate review and the effective assistance of counsel on this capital appeal. Counsel would respectfully submit that a Notice of Supplemental Authority, requiring as it does the mere citation of intervening decisions without argument, Rule 9.210 (g), Fla.R.App.P., is woefully insufficient to raise and preserve an issue for consideration by this Court which was not raised in the initial brief filed previously in this cause. Counsel would note, for this Court's benefit, that the Supreme Court of the United States permits the filing of supplemental briefs

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to apprise the Court of intervening matters at any time prior to the announcement of a decision, with the caveat that the filing of such supplemental briefs will not delay submission and consideration of the case by the Court. See Rules 22.4, 22.5 and 22.6, Rules of Supreme Court(1980 rev.).

7. Thus a substantial question regarding the reliability of the guilt determination in the instant capital case is presented for this Court's review. The issue has not previously been addressed by this Court. The importance of the constitutional question involved herein has been recognized by both Justice Blackmun and Justice Boyd in their respective dissents. Surely where, as in the present case, an indigent defendant's very life may hang in the balance, justice and fairness dictate that this Court permit plenary consideration of the foregoing issue.

WHEREFORE, Appellant respectfully requests this Court to enter an Order allowing fifteen(15) days in which to file a Supplemental Brief limited to the foregoing issue consisting of no more than ten(10) pages in length.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY /s/ Jerry L. Schwarz
JERRY L. SCHWARZ
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable Wallace E. Allbritton, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 5th day of November, 1980.

/s/ Jerry L. Schwarz
Of Counsel.

IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO, Appellant	)	
vs.	)	CASE NO. 50,250
STATE OF FLORIDA, Appellee.	)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Appellant, JOSEPH ROBERT SPAZIANO, hereby moves this Honorable Court for an Order allowing Appellant to file a supplemental brief in the instant case, and as grounds therefor, states:

1. Appellant was sentenced to death on July 16, 1976.

2. The initial brief of Appellant was filed in September, 1978.

3. Oral argument was heard in the present case on October 3, 1979.

4. Since that time the United States Supreme Court has decided the case of Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382 (June 20, 1980) which held that a sentence of death may not be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses. In arriving at its decision, the Court stated:

> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (Footnote omitted). 100 S.Ct. at 2389-2390.

In the present case Appellant was given a choice of waiving the statute of limitations which had run as to all lesser included non-capital offenses or of having the jury instructed only as to first degree murder. Appellant chose the latter

with the result that the jury was not permitted to consider verdicts of guilt of lesser included non-capital offenses (T 751-755). Thus a serious constitutional issue is presented for this Court's determination. The issue involves questions of reliability, as well as due process and equal protection of the laws. Beck v. Alabama, supra; United States v. Jackson, 390 U.S. 570(1968). This Court has not previously addressed this issue, although certiorari was denied after hearing argument in Holloway v. State, 379 So2d 953(Fla.1980) because of a lack of decisional conflict.

5. Briefing of this issue is essential to afford Appellant, an indigent defendant who has been sentenced to death, full and fair appellate review. Additionally, briefing of this issue will aid this Court in fulfilling its duty to independently review the entire record to determine whether the interests of justice require a new trial. Fla.App.R. 6.16 (p); Fla.R.App.P. 9.140(f).

WHEREFORE, Appellant respectfully requests this Court to enter an Order allowing twenty(20) days in which to file a Supplemental brief limited to the foregoing issue consisting of no more than ten (10) pages in length.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida
(305) 837-2150

BY _____
JERRY L. SCHWARZ
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable Wallace E. Allbritton, Atttorney General's Office, The Capitol, Tallahassee, Florida, this 11 day of September, 1980.

_____
Of Counsel.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, NOVEMBER 13, 1980

JOSEPH ROBERT SPAZIANO

Appellant,

vs. CASE NO. 50,250

STATE OF FLORIDA

Appellee.

* * * * * * * * * * * * * * *

Upon consideration of the Appellant's motion for leave to file supplemental brief in the above styled cause, the motion is denied without prejudice to file notice of Supplemental Authority.

RE[illegible]

NOV [illegible] 198[illegible]

[illegible]

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM
C: Jerry L. Schwarz, Esquire
Wallace E. Allbritton, Esquire

IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO, Appellant,	)	
vs.	)	CASE NO. 50,250
STATE OF FLORIDA, Appellee.	)	

MOTION FOR REHEARING

Appellant, JOSEPH ROBERT SPAZIANO, respectfully requests this Honorable Court to grant rehearing from its opinion filed January 8, 1981, and as grounds therefore, states:

In remanding this case for resentencing because of the Gardner violation this Court did not reach the other issues with regard to Appellant's sentence. This Court did however, by affirming Appellant's conviction, reject all challenges to the conviction. Thus rehearing is sought with regard to this Court's decision to affirm Appellant's conviction.

FAILURE TO INSTRUCT ON LESSER DEGREES OF HOMICIDE

In rejecting Appellant's argument that it was constitutionally impermissible to force him to choose between waiving the statute of limitations which had run as to all lesser included noncapital offenses and having the jury instructed only as to first-degree murder, this Court stated:

> "Whatever the implications of Beck v. Alabama may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty." Slip opinion at 5.

This Court may have overlooked the constitutional principle announced in Beck and other relevant decisions bearing on the issue Appellant sought to present. That such a misconception of Beck or overlooking other relevant decisions occurred may be due in large part to this Court's refusals to allow Appellant to file a Supplemental Brief fully raising the issue. Had Appellant been allowed to file a Supplemental Brief then the "implications of Beck v. Alabama" to the instant case might have been readily apparent.

It is well settled in Florida that offenses divisible into degrees are unique in the law and are singled out in the requirement that the factfinder determine which degree of the stated offense, if any, a defendant may be guilty of. Rule 3.490 of the Florida Rules of Criminal Procedure mandates that when a defendant is being tried for a crime which is divided into degrees, "[t]he court shall in all such cases charge the jury as to the [lesser] degrees of the offense." In Brown v. State, 206 So.2d 377,381(Fla. 1968) this Court reinforced this rule [identic lly worded in statutory form as Section 919.14, Florida Statutes(1965)] by mandating that a trial judge MUST instruct on all lesser degrees of the offense charged "if the case is allowed to go to the jury for a determination of guilt or innocence on the offense charged." Accord Brown v. State, 124 So.2d 481(Fla. 1960).

In Killen v. State, 92 So.2d 825 (Fla. 1957), this Court held that the lesser degree offenses were required even when the defendant was charged with first degree felony murder. Section 919.14 was an ABSOLUTE rule.

In State v. Abreau, 363 So.2d 1063(Fla. 1978) this Court mandated:

> [T]he failure to instruct on the next immediate. . . offense (one step removed) constitues error that is PER SE REVERSIBLE (Emphasis added).

Id. at 1064. This Court modified its prior holding in Lomax v. State, 345 So.2d 719(Fla. 1977), but preserved the reasoning in Lomax that when the trial court determines that a lesser-included offense should not be given, the judge

> is permitted to invade the province of the jury by making a unilateral determination that a lesser-included offense instruction is unnecessary because there is overwhelming evidence to convict the defendant of the crime charged.

Lomax at 721. This Abreau per se rule, when combined with this Court's earlier holding regarding lesser degree offenses in Brown, 206 So.2d at 381, provided an end to state assertions of harmless error whenever the trial court failed to instruct on the next

immediate offense.

In the present case the trial judge did not instruct on the lesser degrees of murder because the statute of limitations had run as to those offenses.[1] But such an interpretation cannot be squared with the mandatory requirement of instruction on lesser degrees provided by Rule 3.490, Fla.R.Crim.P.

The purpose of the statute of limitations:

> is to protect every person from being interminably under the threat or cloud of possible criminal prosecution, which otherwise might be indefinitely delayed until the time when defense witnesses die, disappear or otherwise become unavailable, judges would change office, or innumerable other time hazards might develop, which could conceivably defeat or at least hamper, an otherwise good defense.

State v. Hickman, 189 So.2d 254, 261(Fla. 1966). Thus, a person is protected from prosecution and subsequent adjudication for less than capital offenses when a significant period of time has passed.

The functions of the jury, on the other hand, are to weigh the evidence, determine credibility, resolve conflicts and determine the ultimate facts. It must then find within which crime, if any, the determined facts fall.

It is the specific obligation of the jurors "to disregard the consequences of [their] verdict." Fla. Std. Jury Instr.(Crim.) 2.15 ("Matters to be Disregarded"). This standard instruction is an embodiment of the common law of this State. See Johnson v. State, 308 So.2d 38, 40(Fla. 1975) quoting Simmons v. State, 36 So.2d 207, 208(Fla. 1948). The jury here was instructed accordingly (T 804).

The rationale underlying this rule has been aptly expressed by Judge Gewin in Pope v. United States, 298 F.2d 507

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[1] The issue regarding waiver is irrelevant to the present discussion for it is clear that but for the running of the statute of limitations instructions on the lesser degree offenses would have been given and the question of waiver would never have been raised. Additionally, under Florida law, the statute of limitations is a bar to jurisdiction and not an affirmative defense susceptible to waiver. See, e.g., Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946); State v. King, 282 So.2d 162(Fla. 1973); Akers v. State, 320 So.2d 81(Fla. 1st DCA 1979)

(5th Cir. 1962):

> To inform the jury[regarding]. . . MATTERS RELATING TO DISPOSITION OF THE DEFENDANT, tend to draw the attention of the jury away from their function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided. (Emphasis supplied).

Id. at 508. Since the judgment of conviction of the Defendant by the trial court involves the adjudication of the Defendant and the statute of limitation specifically governs this adjudicatory process, the consideration of the statute of limitations (except when factual issues are presented) is not for the jury and should have no effect upon the instructions which guide them in reaching their verdict. It is this very reason that a trial court does not instruct the jury that he may withhold adjudication following a determination of guilt by the jury.

This principle was applied by the Supreme Court of the United States in Keeble v. United States, 412 U.S. 205(1973). In an analogous and remarkably similar situation, the defendant was charged, tried, and convicted in federal district court under the Major Crimes Act of 1885, for assault with intent to commit great bodily injury. The defendant requested an instruction to the jury on the lesser-offense of simple assault. The trial court refused to give the instruction since the trial court was without jurisdiction to try the defendant on such a charge.[2] The Supreme Court reversed the defendant's conviction for the greater offense, holding that the defendant was entitled to an instruction on the lesser offense.[3] The court recognized the inherent danger of abuse of prosecution for the greater offense for which the federal court had jurisdiction:

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[2]Although a later case in the Eighth Circuit; Felicia v. United States, 495 F.2d 353(8th Cir. 1978), held that the district court would have jurisdiction over the lesser offense, it is important to recognize that the Supreme Court found it unnecessary to address this issue in reaching its conclusion. Keeble at 214 n. 14.

[3]The lack of jurisdiction was the precise reason why Justices Stewart, Powell and Rehnquist dissented: "I think this holding would be correct only if the lesser included offense were one over which the federal court had jurisdiction." Keeble at 215(dissent).

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must as a theoretical matter, return a verdict of acquittal. BUT A DEFENDANT IS ENTITLED TO A LESSER OFFENSE INSTRUCTION - IN THIS CONTEXT OR ANY OTHER - PRECISELY BECAUSE HE SHOULD NOT BE EXPOSED TO THE SUBSTANTIAL RISK THAT THE JURY'S PRACTICE WILL DIVERGE FROM THEORY. WHERE ONE OF THE ELEMENTS OF THE OFFENSE CHARGED REMAINS IN DOUBT, BUT THE DEFENDANT IS PLAINLY GUILTY OF SOME OFFENSE , THE JURY IS LIKELY TO RESOLVE ITS DOUBTS IN FAVOR OF CONVICTION. (Emphasis supplied).

Id. at 212-13.

Applying the above principles announced in Keeble to a capital case, the Supreme Court in Beck v. Alabama, 447 U.S.___,100 S.Ct.2382(1980)held that a sentence of death may not be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permittted to consider verdicts of guilt of lesser included non-capital offenses. In arriving at its decision the Court stated:

> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (Footnote omitted). 100 S.Ct. at 2389-2390.

The implications of Keeble and Beck as they apply to the instant case were succinctly stated by Justice Blackmun with whom Justice Brennan and Justice Marshall joined, in his dissent from the denial of certiorari in Holloway v. Florida, ___U.S. ___, 101 S.Ct. 281(1980). Justice Blackmun after reviewing those decisions concluded that:

> The Court's decisions in both Keeble and Beck imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential fact-finding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, legal matter with which the factfinder need have no concern. 101 S.Ct. at 283.

These same concerns were expressed by Justice Boyd in his dissenting opinion from this Court's decision, after hearing argument, to deny certiorari because of a lack of jurisdiction. Holloway v. State, 379 So.2d 953(Fla. 1980). Of course Holloway was not a capital case and the concerns expressed by Justice Blackmun and Justice Boyd are further heightened in the instant case because the death penalty is involved with its attendant greater need for reliability. See Beck v. Alabama, supra, 447 U.S. at ___, 100 S.Ct. at 2389-2390.

Such is our position before the Court. By failing to instruct the jury on the lesser degree offenses, the jury was placed in a position identical to that of the jury in Keeble. There was substantial doubt raised by the State's case as to the guilt of Appellant for the crime charged.[4] Yet, the jury was understandably unwilling to risk the chance that Appellant might in fact be guilty. The verdict unequivocably established that this dilemma in the juror's minds was resolved in favor of guilt as opposed to acquittal. Had the jury been allowed to consider verdicts of lesser degrees then their essential fact-finding function would have been preserved. Instead Appellant's jury was left with only one safeguard against an erroneous decision- they very quickly recommended life as the appropriate punishment.

In Beck a defendant charged with first degree murder in Alabama was barred by the statute from having the jury consider lesser degrees. In the present case, as in Holloway, the defendants were barred by the running of the statute of limitations from having the jury consider lesser degrees. The holding of Beck that in a capital case such a limitation is constitutionally prohibited because it enhances the risk of an unwarranted conviction applies with equal force to the present situation. Thus this Court's

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[4]Indeed the difficulty the jury had in arriving at their verdict, requiring a jury deadlock instruction and hours of deliberation, supports this contention. That difficulty was based on the circumstantial nature of the State's case and the fact that there was absolutely no evidence offered to corroborate the testimony of the State's chief witness, Anthony Dilisio[erroneously referred to as Ralph Dilisio in the opinion(slip at 2) - Ralph Dilisio was Anthony Dilisio's father].

superficial distinction of Beck because it did not involve a statute of limitations does not bear up under close scrutiny. The constitutional principle is the same and applies herein. Clearly, Appellant was entitled to the lesser degree instructions and the trial judge's failure to give them violated Appellant's rights to due process and equal protection of the laws.

The Supreme Court in Keeble, supra, specifically addressed the disparity of justice when a jury instruction is barred in one group of cases whereas the defendants in another group are entitled to the benefit of the instruction on a lesser offense. The court held that the denial by the trial court of the Defendant's request for an instruction on the lesser-offense of simple assault resulted in deprivation of "procedural rights guaranteed to other defendants." Keeble, 412 U.S. at 212.

The Supreme Court in Keeble held that an Indian must be tried in federal court under the same procedure afforded to a non-Indian in federal court. The Court reasoned: 1) a federal statute expressly provide that Indians charged under the Major Crimes Act of 1885 must be tried in the same manner as other persons who are tried in federal court; and 2) the defendant has a right under common law to a jury instruction on a lesser included offense.

The instant case is remarkably similar to Keeble. First, under fundamental principles of constitutional law, a person charged with any crime must be tried in the same manner and with the same fairness granted to others similarly charged. Loper v. Beto, 440 F.2d 934(5th Cir. 1971), vacated on other grounds , 405 U.S. 473(1972). Second, this Court has recognized the absolute right to jury instructions on the lesser degree offenses. Rule 3.490, Fla.R.Crim.P. ; see Brown, 206 So.2d at 381. Therefore, just as in Keeble, Appellant, here, was entitled to the lesser offense instructions, and it was reversible error since the trial court failed to so instruct.

The Keeble principle was again applied in United States

v. Antelope, 430 U.S. 641(1977). The defendants in Antelope were charged and convicted in federal district court under the federal felony-murder statute, even though there was no felony-murder statute under state law. The Court held that no constitutional violation was committed because the defendants were "subjected to the same body of law as any other individual, Indian or non-Indian, charged with first degree murder committed in federal enclave." 430 U.S. at 648.

Here, Appellant was charged with first degree murder and was entitled to be tried in the same manner and with the same right afforded to all other persons similarly charged. When the trial court failed to instruct on lesser degrees because the statute of limitations had run as to them, he was deprived of this right guaranteed to all other persons charged with first degree murder. Effectively, such a rule establishes two standards of justice for persons accused of first degree murder:

1. For persons accused of first degree murder where the statute of limitations has not run, lesser degree instructions would be mandated.

2. For persons accused of first degree murder where the statute of limitations has run, no instructions on lesser degree offenses would be given.

The opportunity for prosecutorial abuse is painfully apparent from such a distinction. Given the recognition in both Keeble and Beck that, although in theory the jury must acquit where the state has failed to prove all the elements of the charged offense and there are no lessers, in fact the jury is likely to resolve any doubts in favor of conviction; an ill-motived prosecutor could in a case where the defendant may have actually committed homicide of a lesser degree wait until the statute of limitations had run and substantially increase the possibility that the defendant will be convicted of the higher charged offense.[5]

[5]Coincidentally the indictment in the present case was returned on September 12, 1975(R 1-2), only some three weeks after the two-year statute of limitations had run as to the lesser degrees of homicide, even though testimony indicated that Appellant's alleged involvement was known as early as March, 1975(T 648).

The horror in such a situation would be magnified manifold if the defense asserted by the defendant were that the defendant did in fact kill the victim but that the facts as presented by the State only constituted manslaughter. Presumably, the defendant could be put to death when he only may have committed manslaughter and the jury could not find a more appropriate crime under which to return a guilty verdict. Such prosecutorial vindictiveness would run afoul of constitutional safeguards. See Blackledge v. Perry, 417 U.S. 21, 27(1974).

The trial judge's failure to instruct on the lesser degrees also deprived Appellant of the right to a "jury pardon." The right to jury pardon has been specifically recognized in Florida. See Bailey v. State, 224 So.2d 296(Fla. 1969); Thomas v. State, 351 So.2d 77(Fla. 4th DCA 1977); Lightfoot v. State, 331 So.2d 388(Fla. 2d DCA 1976), cert. denied, 344 So.2d 376(Fla.1977). This right was best summarized in Brown, 206 So.2d at 381, when this Court equated the mandatory instruction rule to the rule that "gives to the accused the right to have the jury consider the evidence, and, if it desires, find him not guilty of any crime, even though the trial judge might be fully convinced that the evidence overwhelmingly establishes his guilt."

It is no answer that Appellant was treated like all others charged where the statute of limitations had run:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the MEMBERS of the class defined by the legislation. (Emphasis supplied).

McLaughlin v. Florida, 379 U.S. 184, 191, 85 S.Ct. 283, 288(1964). Here, the defendant was placed in the classification of persons whose statute of limitations protections had vested. This Court cannot determine his equality by the treatment of persons within this group, but must demand equality with ALL persons charged with first degree murder.

Joseph Spaziano was indicted and brought to trial shortly after the statute of limitations had run on the lesser degree offenses. The delay was in no way attributable to him. There

was nothing Appellant could have done to place himself before a jury before the statute had run. Yet, he was forced to suffer the consequences of the running of the statute by being placed in a position where the jury could choose only between first degree murder and acquittal. The deprivation of his right to equal treatment with all similarly charged is violative of due process and equal protection of the laws and constitutes, in this capital case, cruel and unusual punishment. This Court should reverse and afford Appellant a new trial where the jury is properly instructed on all degrees of unlawful homicide.

INSUFFICIENCY OF THE EVIDENCE

With regard to the sufficiency of the evidence this Court based its decision on the asserted fact that "Dilisio led the authorities to the dump where the bodies were found two years after he observed them with appellant." Slip opinion at 4. Such an assertion is not supported by the trial record. In fact it is just as likely, and indeed probable, that police investigators, including Lt. Abbgy took Appellant to the scene of the offense and asked him if that was the place he visited two years previously. There is no evidence to support the assertion that he "led" the authorities to the dump as the authorities were already fully aware of that location.

Beyond that this Court has overlooked most of Appellant's arguments as to why Dilisio's testimony is wholly unworthy of belief. Aside from his extensive drug involvement Dilisio also had a motive to lie as he believed Appellant had "raped" his stepmother(R 49-50). In addition, according to his father, Dilisio had a tendency to exaggerate the truth(R 182). Most importantly Dilisio never testified about the alleged incident at the dump until after he went to a hypnotist(R 80). Dilisio testified that he was questioned by Detective Abbgy several times without mentioning the alleged incident. Dilisio stated he could not remember whether the hypnotist used mind-relaxing drugs, nor, perhaps more importantly could he recall whether the hypnotist or Detective Abbgy suggested

anything to him while under hypnosis(R 82-85). The inherently unreliable nature of hypnotically recalled testimony was noted recently by the Supreme Court of Minnesota. State v. Mack, 292 S.W. 2d 764(Minn. 1980). It also must be considered that when Dilisio was first approached by Detective Abbgy and at the time of several of the initial interviews, Dilisio was in detention in Seminole County and at a halfway house(R 74-79 ; T 647-648). Yet, subsequent to the hypnotic session and his revelations to Detective Abbgy, when his deposition was taken Dilisio testified he was on probation(R 47).

All of these factors together detract from the sufficiency of the State's case against Appellant. This Court must not ignore the inconsistencies in Dilisio's testimony nor his motive to lie. Clearly, the evidence, taken as a whole, points as easily to innocence as to guilt. As such, this Court should not sustain a conviction and sentence to the extreme penalty on the unsatisfactory and insubstantial testimony of a 16-year-old admitted drug user. At the very least the interests of justice demand that Appellant be afforded a new trial.

WHEREFORE, for the foregoing reasons Appellant respectfully requests this Honorable Court to grant rehearing, withdraw its prior opinion and order that Appellant be afforded a new trial in the above-styled cause.

Respectfully submitted,

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BY
JERRY L. SCHWARZ
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable Wallace E. Allbritton, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 22nd day of January, 1981.

Of Counsel.

upreme Court of Florida

FRIDAY, MARCH 6, 198?

T SPAZIANO,

llant,

FLORIDA,

ppellee.

CASE NO. 50,250

Circuit Court No. 75-430-CFA
(Seminole)

Upon consideration of the Motion for Rehearing filed in the above se by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur
SUNDBERG, C.J. and ENGLAND, J., would grant Motion for Rehearing for purposes of receiving briefs and argument on the Beck issue

TC
cc: Hon. Arthur H. Beckwith, Jr., Clerk
Hon. Robert B. McGregor, Judge

Jerry L. Schwarz, Esquire
Wallace E. Allbritton, Esquire

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

by: Deputy Clerk

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